



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E033 OF 2020

BETWEEN

HASSAN IBRAHIM MOHAMMED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 20 of 2019 in the Senior Principal Magistrate's Court at Maua by Hon. A.G. Munene (SRM) on 14.10.2020)

JUDGMENT

The charge

1) **HASSAN IBRAHIM MOHAMMED (Appellant)** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 22nd August, 2018 against **H.M.A** a boy child aged 12 years.

Prosecution case

1. The prosecution called a total of four (4) witnesses in support of its case. The prosecution case as narrated by the **PW1 H.M.A**, the complainant was that he was a class 3 pupil at B Primary School. On 22.08.2018 at about 9.00 pm, he met Appellant at Gaciuru town and having known Appellant through a friend asked to be allowed to spend a night in his house which Appellant agreed. That they went to Appellant's house which was one big unpartitioned room and slept on a mat on the floor and in the night, Appellant defiled him and warned that he would kill him if he reported the matter to anyone. The complainant left in the night and went to sleep in the house of one N. The following morning, he reported the matter to K and one A accompanied him to Gaciuru police post where he reported the matter to police.

2. Complainant was on 22.08.2018 examined by PW3 David Nyaga, a clinical officer who found he had laceration measuring 0.5 cm on the anus as shown on the P3 form marked **PEXH. 1**. Appellant was arrested by **PW2 PC Eric Njogu** and handed over to the investigating officer **PW4 Nancy Mumbua Wambua** who preferred charges against him.

Defence case

3. In his sworn evidence, Appellant denied the charges and said he was framed by complainant's father over a land dispute.

4. *In a judgment* dated on 14.09.2020, Appellant was convicted and sentenced to serve an imprisonment term of 15 years.

The appeal

5. Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. He was a minor at the time of conviction

2. Prosecution case was not supported by medical evidence

3. Key witnesses were not called

Analysis and Determination

6. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

7. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and I have identified the following issues for determination:

1. **Age of complainant**
2. **Penetration**
3. **Identification of the assailant**
4. **Age of Appellant**
5. **Sentence**

Age of complainant

8. In the case **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

9. Complainant was in class 3 when he testified in August, 2018 which was the same month that the offence was committed. The P3 form, which was presented as an exhibit stated complainant's age as 12 years. Whereas no birth certificate or age assessment report was tendered in this case, the Court has discretion to find what the apparent age of a victim is from the documents presented to it and from the victim's testimony. (See **Stephen Nguli Mulili v Republic [2014] eKLR**).

10. Therefore, applying the law to the facts of the present appeal, I am satisfied that the complainant's age was proved to the required degree. This view is fortified by the fact that during trial, the defence did not question the age of the Complainant as offered before court.

Penetration

11. Section 2 of **the Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

12. Complainant testified that Appellant defiled him and he felt pain in the anus. The P3 form in respect of complainant which was tendered as **PEXH.1** reveals that he had laceration measuring 0.5 cm on the anus thereby corroborating his evidence of penetration.

Identification of the assailant

13. Appellant does not deny that he was well known to the complainant nor did he deny that complainant slept in his house on the material night. The possibility of Appellant to have been mistaken with another person is therefore improbable.

Appellant's age

14. The trial court record reveals that on 25.10.2018, an order was made that Appellant be taken for age assessment. Although I have not been able to get the assessment report in the file, the trial court did on 08.11.2008 record that the age of the Appellant had been assessed to be 17 years and therefore a minor at the time the offence was committed. Appellant was however 19 years old as at the time of his conviction in 2020.

15. Courts are often faced with a dilemma in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at the time of sentencing or at the time of an appeal.

16. In the case of **JKK vs Republic (2013) eKLR**, the Court of Appeal dealt with an appeal where a minor who was under 18 years at the time of committing the offence of murder and was 21 years when he was convicted and sentenced to death. The Court reduced the sentence from the death penalty to a custodial sentence of 12 years. The Court reasoned as follows:

The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of

the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

17. In **R v Dennis Kirui Cheruiyot [2014] eKLR**, the Appellant was aged 15 years old when the offence was committed and was 20 years at the time he was convicted and sentenced to life imprisonment for murder. The Court of Appeal reduced the sentence to 10 years' imprisonment and expressed itself thus:

Whatever the case, life imprisonment is not provided for under the *Children Act*, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years' imprisonment.

18. Section 191 of the Children's Act which states as follows:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);

(k) by making a community service order; or

(l) in any other lawful manner

19. In both the *Dennis Cheruiyot Case* and the *JKK Case*, the Court of Appeal considered the proviso in section 191(1) and more particularly section 1 (l) of the Children's Act to fashion a sentence that it deemed appropriate for the context and circumstances of the case at hand.

20. Appellant is a youthful offender aged 20 years though he was 17 years old and therefore a minor at the time of committing the offence. The circumstances of this case and the offence, make this case strikingly similar to *Dennis Cheruiyot Case* and the *JKK Case*. I am persuaded by the holding by the Court of Appeal that when faced with the situation such as the one in this case, the solution lies in section 191(1)(l) of *the Act*: to deal with the offender in question in any other lawful manner a fact that the trial court ignored.

21. In the result, I uphold the conviction. I however set aside the fifteen (15) years imprisonment jail term. Given that the Appellant has already served one years' jail term which he ought not to have served and was in prison custody for 2 years pending trial, I will consider it as sufficient punishment so far. I order that he be forthwith set free unless he is otherwise lawfully held.

DELIVERED AT MERU THIS 6TH DAY OF OCTOBER 2021

WAMAE.T. W. CHERERE

JUDGE

COURT ASSISTANT - KINOTI

ACCUSED - PRESENT IN PERSON

FOR THE STATE - MS. MWANIKI